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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 14 1 13 PM '04

In the Matter of)

DISPATCH: 9/14/04

Implementation of the Telecommunications
Act of 1996:)

CC Docket No. 96-115

Telecommunications Carriers' Use of
Customer Proprietary Network Information
and Other Customer Information)

**MEMORANDUM OPINION AND
ORDER ON RECONSIDERATION**

Adopted: August 25, 2004

Released: September 13, 2004

By the Commission:

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I. INTRODUCTION

1. In this Order, we address the petitions for reconsideration of the *Subscriber List Information Order*,¹ which adopted rules to implement section 222(e) of the Communications Act of 1934, as amended (Communications Act or Act).² We deny requests that we modify certain aspects of the complaint procedures, notification requirements, and unbundling requirements established in the *Subscriber List Information Order*. We eliminate, however, a requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where customers choose to cease having their numbers listed. We also modify our contract disclosure requirement to allow carriers to withhold from disclosure those portions of their contracts that are unrelated to the provision of subscriber list information and to subject such disclosures to confidentiality agreements. Finally, we affirm other aspects of the *Subscriber List Information Order* that were subject to petitions for reconsideration.

II. BACKGROUND

2. Section 222(e) requires carriers that provide telephone exchange service to provide subscriber list information to requesting directory publishers “on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions.”³ In enacting this section, Congress sought to prevent carriers from leveraging their control over subscriber list information in order to impede competition in directory publishing.⁴ Consistent with that congressional intent, the Commission

¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-98, 99-273, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) (*Subscriber List Information Order*). Appendix A to this order lists parties filing petitions for reconsideration as well as comments and replies in this proceeding. We note that two parties, Bell Atlantic and GTE, have merged to form Verizon. Notwithstanding this merger, we use the names Bell Atlantic and GTE to reference pleadings filed by those companies in this proceeding. Further, CompTel and ASCENT (formerly the Telecommunications Reseller Association (TRA)) have merged to form the CompTel/ASCENT Alliance. Notwithstanding this merger, we use the names CompTel and ASCENT herein to reference pleadings filed by CompTel and TRA in this proceeding. We refer to other parties that have undergone name changes during the course of this proceeding by their current names. Specifically, we use the name Qwest to reference pleadings filed by U S WEST Communications and the name YPIMA to reference pleadings filed by the Yellow Pages Publishers Association. We also note that on April 26, 2004, NTCA filed a letter withdrawing its petition for reconsideration. Letter from Daniel Mitchell, Senior Regulatory Counsel, NTCA, to Marlene H. Dortch, Secretary, FCC (filed Apr. 26, 2004) (NTCA Apr. 26, 2004 *Ex Parte* Letter). Therefore, we need not address NTCA's petition for reconsideration.

² 47 U.S.C. § 222(e).

³ 47 U.S.C. § 222(e). Subscriber list information includes listed subscribers' names, addresses, and telephone numbers as well as headings under which businesses are listed in the yellow pages. 47 U.S.C. § 222(f)(3).

⁴ See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., 205 (1996) (*Joint Explanatory Statement*) (subscriber list information provision guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms, and conditions from any provider of local telephone service); H. Rep. No. 104-204(1), 104th Cong., 1st Sess., 89 (1995) (*1995 House Report*) (subscriber list provision “meets the needs of independent publishers for access to subscriber data”); see also S. Rep. No. 103-367, 103rd Cong., 2d Sess., 97 (1994) (*1994 Senate Report*) (provision that was basis for what ultimately became section 222(e) “is intended to prohibit unfair practices by local exchange carriers and encourage competition”).

adopted, in the *Subscriber List Information Order*, comprehensive rules designed to create, without further Commission intervention, reasonable and workable procedures for carrier provision of subscriber list information to directory publishers.⁵ The Commission also established presumptively reasonable rates of \$0.04 per listing for base file subscriber list information and \$0.06 per listing for updated subscriber list information.⁶ In adopting these rules and presumptively reasonable rates, the Commission envisioned that they would help carriers and directory publishers resolve most subscriber list information disputes without further regulatory intervention.⁷ The Commission also envisioned that, if problems arose requiring its involvement, the formal complaint process would apply, including the possibility of accelerated docket treatment.⁸

III. DISCUSSION

A. Complaint Procedures

3. In the *Subscriber List Information Order*, the Commission adopted specific requirements for complaint proceedings in which directory publishers challenge the rates that carriers charge for subscriber list information.⁹ ADP requests that we modify these procedures to grant automatic interim relief and allow a publisher to pay the presumptively reasonable rates while a complaint is pending. ADP also asks that we guarantee that any subscriber list information rate complaint will be given accelerated docket treatment or otherwise resolved within 60 days.¹⁰ For the reasons discussed below, we decline to take the actions that ADP requests.

1. Interim Rate Relief During Pendency of a Complaint

4. ADP argues that, whenever a section 208 formal complaint is filed challenging subscriber list information rates that exceed the presumptively reasonable rates, the Commission should order the

⁵ *Subscriber List Information Order*, 14 FCC Rcd at 15560-615, paras. 11-123.

⁶ *Id.* at 15589-90, para. 72, & 15607, para. 104. We use the term "base file" to refer collectively to initial load and refresh services. See generally 47 C.F.R. § 64.2305(a) (stating that "[a] directory publisher requests base file subscriber list information when the publisher requests, as of a given date, all of a carrier's subscriber list information that the publisher wishes to include in one or more directories"). As used in the *Subscriber List Information Order*, update services include "new connect" services that provide only subscriber list information regarding new telephone exchange service subscribers. *Subscriber List Information Order*, 14 FCC Rcd at 15562-63, n.39; see also 47 C.F.R. § 64.2305(h) (stating that "[a] directory publisher requests updated subscriber list information when the publisher requests changes to all or any part of a carrier's subscriber list information occurring between specified dates").

⁷ See *Subscriber List Information Order*, 14 FCC Rcd at 15566-67, para. 23, & 15591, para. 76.

⁸ See *id.* at 15591, para. 76. We note that these expectations generally have been realized in that interested parties have negotiated subscriber list information arrangements largely without resort to the formal complaint process.

⁹ *Subscriber List Information Order*, 14 FCC Rcd at 15607-08, paras. 105-107, & 15615, para. 123.

¹⁰ ADP Petition at 14-16. The Commission has adopted procedures that provide for the resolution, within 60 days, of formal complaint proceedings that are accepted onto the accelerated docket. The Commission also adopted pre-filing procedures, including settlement discussion requirements, to expedite the accelerated docket process. See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, 13 FCC Rcd 17018, 17021, para. 4 (1998) (*Formal Complaints Order*) (subsequent history omitted).

defendant to charge only the presumptively reasonable rates while the complaint is pending.¹¹ We disagree. Requiring a directory publisher to pay only the presumptively reasonable rates whenever it challenges the carriers' rates would increase the number of rate challenges, which would result in additional expenses to the parties and the public without any offsetting benefits. In essence, ADP is requesting interim injunctive relief, since, under its proposal, we would enjoin the defendant from charging any rate over those that we have found to be presumptively reasonable. The threshold for obtaining such relief is exceptionally high, and the factors assessed in determining whether that threshold has been met are very fact-intensive.¹² ADP has not shown that every rate complaint inherently will qualify for such extraordinary relief. For example, the *Subscriber List Information Order* specifically envisioned circumstances under which subscriber list information rates higher than the presumptive rates might be found reasonable, which negates ADP's assertion that every rate complaint would have a significant likelihood of success on the merits. Accordingly, we decline to adopt ADP's proposal for automatic interim relief.

2. Expedited Treatment of Rate Complaints

5. ADP requests that we guarantee that publishers' complaints regarding subscriber list information rates will be afforded automatic accelerated docket treatment or that such complaints be resolved within 60 days of their filing.¹³ We reject these requests.¹⁴ In the 1996 Act, Congress required that the Commission expedite certain types of complaints without requiring that it expedite subscriber list information complaints.¹⁵ We have no statutory mandate to expedite subscriber list information complaints, and ADP provides no persuasive argument why we should otherwise single out such complaints for expedited treatment.¹⁶ The Commission has adopted generally applicable standards for accelerated docket treatment to ensure that certain conditions are met before any complaint is accepted

¹¹ See ADP Petition at 15; ADP Reply at 9. No other party supports ADP's request.

¹² See, e.g., *Formal Complaints Order*, 12 FCC Rcd at 22571, para. 169 (referencing *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), which sets forth the following four factors: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of interim relief; (3) the degree of injury to other parties if relief is granted; and (4) whether interim relief will further the public interest).

¹³ ADP Petition at 16.

¹⁴ We note that no commenter supports either of ADP's requests.

¹⁵ Compare, e.g., 47 U.S.C. §§ 260(b) (requiring that the Commission to establish procedures for expedited consideration of any complaint alleging material financial harm to a provider of telemessaging service); 271(d)(6)(B) (unless the parties otherwise agree, giving the Commission 90 days to act on any complaint alleging that a Bell Operating Company (BOC) has ceased to meet the statutory conditions for approval to provide in-region, interLATA services); 275(c) (requiring that the Commission make a final determination with respect to certain alarm monitoring complaints within 120 days) with 47 U.S.C. § 222(e).

¹⁶ We note that our experience with subscriber list information rate complaints also provides no reason for singling out those complaints for expedited treatment. Indeed, directory publishers have filed only two such complaints since the release of the *Subscriber List Information Order* on September 9, 1999. See *McLeodUSA Publishing Co. v. Wood County Telephone Co.*, 17 FCC Rcd 6151 (2002) (finding that the carrier had failed to provide reliable cost data supporting subscriber list information rates exceeding the presumptively reasonable rates); *Yellow Book USA v. Bell Atlantic Corp.*, 15 FCC Rcd 15927 (Market Disputes Resolution Div., Enf. Bur. 2000) (dismissing subscriber list information rate complaint at the parties' joint request).

for that docket.¹⁷ We find no reason to forgo that meaningful case-by-case analysis for subscriber list information complaints. Indeed, the Commission has not, to date, granted any specific type of complaint automatic accelerated docket treatment. Accordingly, we reject ADP's request that publishers' complaints regarding subscriber list information rates be accorded automatic accelerated docket treatment or that such complaints be resolved within 60 days of their filing.

B. Treatment of Unlisted Numbers

6. In the *Subscriber List Information Order*, the Commission required that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where the customers decide to "cease having particular telephone numbers listed."¹⁸ The Commission reasoned that this requirement would enable directory publishers to avoid listing those numbers.¹⁹ ALLTEL, Bell Atlantic, and Qwest request that we eliminate this requirement. They argue that providing requesting directory publishers with the required notice imposes significant costs on carriers and would not materially benefit directory publishers, and no commenter opposes their requests.²⁰ We grant petitioners' request to eliminate the requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where the customers decide to cease having particular telephone numbers listed.²¹ We note that we are aware of no instance in which a directory publisher has asked a carrier for notice of changes in subscriber list information.²² Instead, it appears that directory publishers generally purge unlisted numbers from their databases by obtaining updated subscriber list information from carriers.²³ The record shows, in addition, that this requirement is not needed to protect consumers, who typically change their telephone numbers when they request unlisted or unpublished status.²⁴ Thus, the cost of requiring notice would appear to outweigh substantially any benefit to directory publishers or consumers.

¹⁷ See *Formal Complaints Order*, 13 FCC Rcd at 17028, para. 17 (conferring on the staff administering the accelerated docket broad discretion to determine which formal complaints it will accept for that docket).

¹⁸ *Subscriber List Information Order*, 14 FCC Rcd at 15588, para. 70. The Commission declined to require notice of other types of changes in subscriber list information because it was not convinced that the benefits would exceed the costs. *Id.*

¹⁹ *Id.*

²⁰ ALLTEL Petition at 2, 4-5; Bell Atlantic Petition at 2-4; Qwest Petition at 1-5. BellSouth, GTE, and YPIMA support ALLTEL's, Bell Atlantic's, and Qwest's requests. BellSouth Comments at 12-13; GTE Comments at 3-5; YPIMA Reply at 10; see also Bell Atlantic Reply at 2 (pointing out that even MCI, whose broader request prompted the Commission to adopt this requirement, does not support its retention).

²¹ Because the Commission did not codify this requirement in the Code of Federal Regulations, the requirement's elimination does not necessitate a change in those regulations.

²² Cf. Bell Atlantic Petition at 2 (stating that it was unaware of any publisher that required this "narrow" type of information update); Qwest Petition at 4 (arguing that Qwest had never received a request for this type of "number change status list").

²³ See GTE Comments at 3-4; see also BellSouth Comments at 12; Qwest Comments at 3; YPIMA Comments at 10.

²⁴ E.g., Bell Atlantic Petition at 3; BellSouth Comments at 12; YPIMA Comments at 10.

C. Availability of Written Contracts

7. To help ensure compliance with the nondiscrimination requirement in section 222(e), the Commission required “each carrier that is subject to section 222(e) to make available to requesting directory publishers any written contracts that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or any entity that publishes directories on the carrier’s behalf.”²⁵ ALLTEL urges the Commission to adopt a procedure under which relevant contracts would have to be produced only in the event that a directory publisher makes a good faith allegation of discrimination and the Commission orders production after *in camera* inspection.²⁶ In addition, ALLTEL asks whether the rule is reciprocal and thus requires independent publishers to provide copies of their contracts to a carrier upon request.²⁷ BellSouth asks us to confirm that carriers need not disclose to independent publishers portions of contracts unrelated to the provision of subscriber list information and that the Commission did not intend to require disclosure in the absence of appropriate confidentiality protections.²⁸ ADP opposes ALLTEL’s requests, but agrees with BellSouth’s position on disclosure of unrelated portions of contracts.²⁹

8. We decline to adopt ALLTEL’s proposal that we require carriers to provide access to contracts only pursuant to a good faith allegation of discrimination. Adoption of that proposal would negate the Commission’s reason for imposing the disclosure requirement in the first place, namely “[t]o ensure that independent directory publishers will be able to determine the rates, terms, and conditions under which a carrier provides subscriber list information for its own directory publishing operations.”³⁰ The disclosure requirement thus serves two important purposes. First, it discourages unlawful behavior by subjecting carriers’ contracts to scrutiny.³¹ Second, it allows independent publishers the ability to discover discriminatory rates, terms, and conditions.³² Moreover, we note that we have not received any complaints regarding abuse of the contract disclosure requirements since adoption of the *Subscriber List Information Order*, indicating that ALLTEL’s concerns may well have been unfounded.

²⁵ *Subscriber List Information Order*, 14 FCC Rcd at 15582, para. 58; see also 47 C.F.R. § 64.2341(c).

²⁶ ALLTEL Petition at 2-4; see GTE Comments at 11 (arguing that the disclosure requirement skews the competitive relationship between the participants, and unfairly disadvantages carriers *vis-a-vis* independent publishers); BellSouth Comments at 15 (urging that we adopt procedures, such as requiring *bona fide* requests and protective orders, to discourage “fishing expeditions,” for the terms of contracts between carriers and their directory publishers); see also YPIMA Comments at 8.

²⁷ ALLTEL Petition at 4-5, n.4.

²⁸ BellSouth Comments at 15-16; see ALLTEL Petition at 3 (asserting that contracts between carriers and their directory publishers contain competitively sensitive information unrelated to the provision of subscriber list information); GTE Comments at 12 (urging that carriers should have to disclose only the relevant portions of their subscriber list information contracts).

²⁹ ADP Comments at 5-6; ADP Reply at 6.

³⁰ *Subscriber List Information Order*, 14 FCC Rcd at 15582, para 58.

³¹ *Id.*; see ADP Comments at 6; ADP Reply at 6 (contending that disclosure requirement deters carriers from discriminating against independent publishers).

³² *Subscriber List Information Order*, 14 FCC Rcd at 15582, para 58.

9. Contrary to ALLTEL's position,³³ the contract disclosure rule is not reciprocal and thus does not entitle ALLTEL's directory publishing affiliate to obtain a copy of any agreement reached between another carrier and an independent directory publisher.³⁴ Unlike the situation with carriers which are required to provide subscriber list information "under nondiscriminatory . . . rates, terms, and conditions,"³⁵ the statute does not preclude directory publishers from obtaining subscriber list information under rates, terms, and conditions that favor one carrier over another. The discrimination concerns that persuaded the Commission to require contract disclosure therefore simply do not apply with respect to contracts through which a directory publisher obtains subscriber list information from other carriers.

10. We do agree with ADP, BellSouth, and GTE, however, that the contract disclosure requirement should apply only to portions of contracts that are related to the carrier's provision of subscriber list information.³⁶ We therefore amend our rules to make clear that carriers may redact portions of requested contracts that are *wholly unrelated* to that activity. Such contractual provisions govern the private business relationship between a carrier and its directory publisher, and address matters such as directory formats and publication schedules.³⁷ Carriers may not, however, redact any information that is relevant to determining rates, terms, or conditions for the provision of subscriber list information. We also amend our rules to make clear that carriers may subject their disclosure of subscriber list information contracts to confidentiality agreements that limit access to and use of the information to the purpose of determining the rates, terms, and conditions under which a carrier provides subscriber list information to its own directory publishing operations, as BellSouth suggests.³⁸ These changes will ensure that any disclosure of subscriber list information contracts will not unfairly disadvantage carriers or their directory publishing operations.³⁹

D. Timeframe for Provision of Subscriber List Information

11. In the *Subscriber List Information Order*, the Commission adopted two rules to help ensure that carriers provide subscriber list information on a "timely" basis as required by section 222(e). First, the Commission required that a carrier must provide subscriber list information at the time specified by the directory publisher, provided that the directory publisher has given at least 30 days advance notice

³³ ALLTEL Petition at 4-5, n.4.

³⁴ See *id.*; see also YPIMA Comments at 8.

³⁵ 47 U.S.C. § 222(e).

³⁶ ADP Comments at 7; BellSouth Comments at 15; GTE Comments at 12; ADP Reply at 6; see ALLTEL Petition at 4.

³⁷ See generally ALLTEL Petition at 3.

³⁸ BellSouth Comments at 15-16; see ALLTEL Petition at 4.

³⁹ We note our rules requires that "to the extent any of a carrier's rates, terms, or conditions for providing subscriber list information for [its own directory publishing] operations are not set forth in a written contract, the carrier must keep a written record of, and make available to requesting directory publishers, those rates, terms, and conditions." *Subscriber List Information Order*, 14 FCC Rcd at 15582, para. 58; see also 47 C.F.R. § 64.2341(b), (c). Because a carrier's proprietary concerns apply to these records in the same manner they apply to contracts, we also amend our rules to permit carriers to subject their disclosure of subscriber list information records to confidentiality agreements.

and the carrier's internal systems can accommodate the directory publisher's request.⁴⁰ Second, where the carrier's internal systems cannot accommodate the directory publisher's request, the Commission required that the carrier inform the directory publisher of that fact within 30 days of receiving its request for subscriber list information.⁴¹ This notice must tell the publisher, among other information, when the carrier will be able to deliver subscriber list information to the publisher.⁴² The Commission also required that the carrier must meet the delivery schedule that the publisher chooses from among those available.⁴³

12. ADP asks that we reduce from 30 to seven days the period within which the carrier must inform the publisher that it cannot accommodate the publisher's request. ADP asserts that carriers generally are able to determine in much less than 30 days whether they are able to accommodate a directory publisher's request for subscriber list information.⁴⁴ ADP also expresses concern that a directory publisher that gives a carrier only 30 days to provide listings may receive a negative response from the carrier on the exact date the publisher expects to receive the listings.⁴⁵ GTE and Qwest contend that 30 days is a reasonable amount of time for a carrier to respond to a request for subscriber list information.⁴⁶

13. In adopting the rules described above, the Commission sought to balance the interests of directory publishers and carriers. Based on the record before us, we are not persuaded that the balance the Commission reached was unreasonable or that a different balance would benefit materially directory publishers.⁴⁷ We note that a directory publisher may ensure against receiving a negative response from the carrier on the day it expects to receive the requested listings simply by giving the carrier more than 30 days advance notice prior to the desired delivery date.⁴⁸ We therefore find ADP's concern in this regard misplaced. Accordingly, we decline to change the timeframe in which carriers must inform directory publishers that they cannot comply with a request for subscriber list information to seven days, as ADP proposes.

⁴⁰ *Subscriber List Information Order*, 14 FCC Rcd at 15584, para. 62.

⁴¹ *Id.* at 15587, para. 66, & 15609, para. 109.

⁴² *Id.* at 15587, para. 66, & 15609, para. 109.

⁴³ *Id.* at 15587, para. 66.

⁴⁴ ADP Petition at 11.

⁴⁵ *Id.* at 11-12; ADP Reply at 8-9; Letter from Sophie J. Keefer, Willkie, Farr & Gallagher, to Magalie Roman Salas, Secretary, FCC, at 2 (filed Feb. 17, 2000) (ADP Feb. 17, 2000 *Ex Parte* Letter).

⁴⁶ See GTE Comments at 8-9; Qwest Comments at 6.

⁴⁷ See GTE Comments at 8-9 (arguing that 30 days is a reasonable period for a carrier to investigate the capabilities of its internal systems); Qwest Comments at 6 (maintaining that the Commission should not impose a seven-day turn-around time for any activity that is not life-threatening).

⁴⁸ *Subscriber List Information Order*, 14 FCC Rcd at 15584, para. 62 (suggesting that a directory publisher may want to give a carrier more than 30 days to fill requests for subscriber list information when that is consistent with the publisher's schedule).

E. Safeguards

14. In the *Subscriber List Information Order*, the Commission considered what safeguards might be necessary to ensure that a person seeking subscriber list information pursuant to section 222(e) is doing so “for the purpose of publishing directories,” as that section requires.⁴⁹ The Commission allowed carriers to require entities requesting subscriber list information pursuant to section 222(e) to certify that they will use that information only for directory publishing purposes.⁵⁰ The Commission required that, absent a Commission order to the contrary, a carrier must comply with a directory publisher’s request for subscriber list information once the directory publisher has certified that it will be used only for directory publishing purposes.⁵¹ The Commission specifically rejected YPIMA’s proposal that a carrier be allowed to refuse to disclose subscriber list information when it believes that a directory publisher will use the information for purposes other than, or in addition to, directory publishing.⁵² Bell Atlantic requests that the Commission reconsider this approach and allow a carrier to refrain from providing subscriber list information to directory publishers that the carrier reasonably believes will misuse it.⁵³ BellSouth, Qwest, and YPIMA support Bell Atlantic’s request.⁵⁴ ADP, in contrast, maintains that carriers’ concerns about misuse of subscriber list information are purely speculative and that allowing carriers to withhold subscriber list information would have anticompetitive effects.⁵⁵

15. We affirm our requirement that a carrier must comply with a directory publisher’s request for subscriber list information once the directory publisher certifies that it will use the information only for directory publishing purposes. We believe that this “innocent until proven guilty” approach properly implements the statutory directive that carriers provide subscriber list information to requesting directory publishers “on a timely . . . basis.”⁵⁶ Specifically, this approach ensures that a directory publisher that meets the certification requirement will have the subscriber list information it needs to publish its directories pending resolution of any dispute regarding subscriber list information usage. In contrast, the “guilty until proven innocent” approach that Bell Atlantic, BellSouth, and Qwest urge could force directory publishers to delay publication of their directories until resolution of such disputes, contrary to Congress’ intent to promote competition in directory publishing.⁵⁷

⁴⁹ *Subscriber List Information Order*, 14 FCC Rcd at 15610-12, paras. 111-15.

⁵⁰ *Id.* at 15610, para. 112.

⁵¹ *Id.* at 15611-12, para. 115.

⁵² *Id.*

⁵³ Bell Atlantic Petition at 4-7 (arguing that an entity may seek to purchase subscriber list information for purposes unrelated to directory publishing and that it is unrealistic to expect that the carrier will be able to obtain a Commission determination soon enough to prevent misuse of the information).

⁵⁴ BellSouth Comments at 14 (contending that carriers must be provided an effective means of curbing abuse); Qwest Comments at 4-5 (arguing that the Commission should not insinuate itself into contractual relationships between private parties); YPIMA Comments at 9 (maintaining that the only way to redress misuse of subscriber list information will be for the carrier to sue the misuser for breach of contract).

⁵⁵ ADP Comments at 2-3; ADP Reply at 7.

⁵⁶ *See Subscriber List Information Order*, 14 FCC Rcd at 15611-12, paras. 115

⁵⁷ *See id.*

16. We note that YPIMA proposes a limited “guilty until proven innocent” approach that would distinguish between established directory publishers and other entities. Under this approach, the carrier would be able to withhold subscriber list information only where two conditions are met: the carrier has a good faith belief that the party requesting subscriber list information will use it improperly; and the requesting entity has not previously purchased subscriber list information from the particular carrier.⁵⁸ Yet even this approach would enable the carrier to delay entry by potential directory publishing competitors by forcing them to obtain Commission determinations in their favor prior to their receiving subscriber list information.⁵⁹ Such a sweeping measure is not necessary based on this record. Accordingly, we find that the better course is to require that the carrier provide subscriber list information to all entities meeting the certification requirement pending resolution of any dispute regarding subscriber list information usage.

17. We reject Bell Atlantic’s argument that an “innocent until proven guilty” approach does not adequately protect consumers against unwanted commercial solicitation calls.⁶⁰ The national do-not-call rules,⁶¹ which went into full effect after the adoption of the *Subscriber List Information Order* in 1999, already provide consumers with extensive protection against such calls.⁶² We do not believe that allowing carriers to withhold subscriber list information that they suspect will be used for telemarketing, as Bell Atlantic proposes, would provide meaningful additional protection. Moreover, given that our subscriber list information rules permit directory publishers to use subscriber list information obtained pursuant to section 222(e) to solicit advertisers for directories,⁶³ implementation of Bell Atlantic’s proposal could impede competition in directory publishing.

18. We also reject Bell Atlantic’s argument that carriers will have no effective remedy in the event directory publishers misuse subscriber list information obtained pursuant to section 222(e).⁶⁴ As Bell Atlantic acknowledges, carriers may bring a civil action for breach of contract if directory publishers misuse subscriber list information.⁶⁵ The prospect of such suits should help deter entities from misusing subscriber list information obtained pursuant to section 222(e).

⁵⁸ Letter from Joel Bernstein, Halprin Temple, to Marlene H. Dortch, Secretary, FCC, at 4 (filed Mar., 19, 2004) (YPIMA Mar. 19, 2004 *Ex Parte* Letter).

⁵⁹ *Id.*

⁶⁰ *E.g.*, Bell Atlantic Petition at 5.

⁶¹ 47 C.F.R. § 64.1200.

⁶² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (*Do-Not-Call Order*) (subsequent history omitted).

⁶³ 47 C.F.R. § 64.2337(a)-(b). Of course, any such solicitations must be consistent with the national do-not-call rules.

⁶⁴ See Bell Atlantic Petition at 6.

⁶⁵ Bell Atlantic Comments at 2-3. Any contractual provisions, of course, must be consistent with section 222(e) and our implementing rules. See Letter from Sophie J. Keefer, Willkie, Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC, at 1 (filed May 5, 2004) (ADP May 5, 2004 *Ex Parte* Letter). We decline to address more specifically on the record before us whether carriers may use any particular contractual provisions to protect against misuse of subscriber list information by directory publishers. Compare Letter from Joel Bernstein, Halprin Temple, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Apr. 23, 2004) (YPIMA Apr. 23, 2004 *Ex Parte* Letter) (arguing that, among other contractual provisions, carriers may reasonably prohibit third-party use of subscriber list (continued....))

F. Role of Carrier Publishing Affiliates

19. ADP asks that we make clear that carriers may not use their publishing affiliates to avoid fulfilling their duties under section 222(e).⁶⁶ ADP asserts that the Commission has historically refused to allow carriers to avoid obligations by use of agents.⁶⁷ ADP notes that carriers often have nonregulated affiliates or third parties publish their directories. Following release of the *Subscriber List Information Order*, ADP states, several carriers opined that, while the carrier itself is required to comply with section 222(e) and the Commission's rules, the publishing affiliate is not.⁶⁸ Other parties argue that the clarification that ADP seeks is unnecessary and that ADP is incorrect in suggesting that carriers' directory publishing affiliates are themselves subject to section 222(e).⁶⁹

20. In the *Subscriber List Information Order*, the Commission determined that a carrier's decision to have an affiliate or third party assign primary advertising classifications as required under a state obligation "does not absolve the carrier of its obligation to provide those classifications to requesting directory publishers in accordance with section 222(e)."⁷⁰ The principle behind this determination was that a carrier should not be allowed to use an affiliate to evade its subscriber list information responsibilities. We believe this principle is correct and therefore agree with ADP that carriers may not use their publishing affiliates to avoid fulfilling their duties under section 222(e) and our implementing rules.

G. Section 222(e) Unbundling

21. In implementing section 222(e)'s unbundling requirement, the Commission concluded in the *Subscriber List Information Order* that section 222(e) precludes a carrier from bundling listings that the carrier is able to sell separately.⁷¹ Consistent with section 222(e)'s legislative history, the Commission required carriers to unbundle subscriber list information, including updates, on any basis requested by a directory publisher that the carrier's internal systems can accommodate.⁷² If the process results in the provision of listings in addition to those the directory publisher requested, the carrier may impose charges for, and the directory publisher may publish, only the requested listings.⁷³

22. Bell Atlantic requests that the Commission determine that if a carrier is unable to unbundle subscriber list information in the manner that the publisher requests, the publisher must pay for all the

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information being provided pursuant to section 222(e)) with ADP May 5, 2004 *Ex Parte* Letter, at 1-2 (contending that a prohibition on third-party use would not make sense in view of the fact that directory publishers purchase subscriber list information specifically for publication in directories that will be made available for use by the public).

⁶⁶ ADP Petition at 12-14.

⁶⁷ See *id.* at 13, n.31.

⁶⁸ *Id.* at 12.

⁶⁹ Bell Atlantic Comments at 2-3; BellSouth Comments at 8-9; YPIMA Comments at 6-7.

⁷⁰ *Subscriber List Information Order*, 14 FCC Rcd at 15572, para. 35.

⁷¹ *Id.* at 15584-85, para. 63.

⁷² *Id.* (citations omitted).

⁷³ *Id.* at 15587, para. 66.

listings received, not just the listings that the publisher uses.⁷⁴ ADP argues that if a publisher's request for unbundling is reasonable, yet the carrier's internal systems cannot accommodate it, the publisher should not be required to pay for the additional listings.⁷⁵

23. We agree with ADP and decline to adopt the change Bell Atlantic requests. We believe the unbundling requirements adopted in the *Subscriber List Information Order* properly balance carriers' and directory publishers' competing interests. Those unbundling requirements were premised on keeping "a carrier from profiting from shortcomings in its internal systems and a directory publisher from profiting from requesting fewer listings than it intends to publish."⁷⁶ Moreover, a blanket requirement that a directory publisher pay for listings it neither requests nor uses could result in unreasonable subscriber list information rates. Of course, a directory publisher that uses listings that it has not paid for may be found liable to the carrier if the carrier brings a civil action to enforce the contract between the carrier and the directory publisher.

H. Unpublished and Unlisted Information

24. ADP requests that we determine that sections 201 and 202 of the Act mandate that carriers provide unpublished and unlisted information to competing publishers if the carriers provide that information to their own publishing affiliates.⁷⁷ Several parties argue, however, that the Commission began this proceeding to consider adopting regulations to implement section 222 of the Act, and adopting general rules to implement sections 201 and 202 would be beyond the scope of this proceeding.⁷⁸

25. We agree with those commenters that assert that ADP's request is beyond the scope of this proceeding.⁷⁹ As these parties point out, the *Notice* in this proceeding sought comment on interpreting and implementing section 222(e), without any indication that the Commission might act pursuant to sections 201 or 202.⁸⁰ We therefore deny ADP's request because it would be inappropriate for us in this reconsideration proceeding to decide to take action under sections 201 and 202 of the Act.⁸¹ We thus make no specific legal conclusions or findings here, but note that we retain the ability to examine this area under sections 201 and 202, if called upon to do so as a result of an allegation of unreasonable or unreasonably discriminatory conduct.

⁷⁴ Bell Atlantic Petition at 7-9; see BellSouth Comments at 13 and Qwest Comments at 5 (both supporting Bell Atlantic's request).

⁷⁵ ADP Reply at 8.

⁷⁶ *Subscriber List Information Order*, 14 FCC Rcd at 15587, para. 66.

⁷⁷ ADP Petition at 3-5. In the *Subscriber List Information Order*, the Commission determined that because the definition of subscriber list information in section 222(f)(3)(B) excludes unpublished and unlisted information, section 222(e) does not require carriers to provide the names or addresses of subscribers with unlisted or unpublished numbers to independent publishers. *Subscriber List Information Order*, 14 FCC Rcd at 15575, para. 41 (footnote omitted). ADP does not challenge this determination.

⁷⁸ Bell Atlantic Comments at 2-3; GTE Comments at 6; Qwest Comments at 7; YPIMA Comments at 3.

⁷⁹ Bell Atlantic Comments at 2-3; GTE Comments at 6; Qwest Comments at 7; YPIMA Comments at 3.

⁸⁰ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12512, 12531-32, paras. 43-46 (1996) (*Notice*).

⁸¹ See *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

26. Appendix C sets forth the Supplemental Final Regulatory Flexibility Analysis for this *Memorandum Opinion and Order on Reconsideration*, as required by the Regulatory Flexibility Act of 1980, as amended.⁸²

B. Paperwork Reduction Act

27. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirement contained in this proceeding.

28. In this present document, we take three actions that modify the information collection burdens on carriers, including those that are small business concerns. First, we eliminate a requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where the customers decide to cease having particular telephone numbers listed. Second, we allow carriers to withhold from disclosure to requesting directory publishers those portions of their subscriber list information contracts that are unrelated to the provision of subscriber list information. Finally, we allow carriers to subject such disclosures to appropriate confidentiality agreements. We have assessed the effects of each of these actions on small business concerns. We find that these actions properly recognize the interests of such concerns. Specifically, the elimination of our requirement regarding notice of changes in subscriber list information eliminates a previously-imposed burden. In addition, the changes to our contract disclosure requirement reduce the information that carriers must disclose to requesting directory publishers and enable carriers to protect themselves against the improper use of disclosed information.

C. Congressional Review Act

29. The Commission will include a copy of this *Memorandum Opinion and Order on Reconsideration* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act. See 5 U.S.C. § 801(a)(1)(A).

D. Accessible Formats

30. To request materials in accessible formats for individuals with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), or 202-418-7365 (tty).

V. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403, that this *Memorandum Opinion and Order on Reconsideration* IS ADOPTED.

⁸² See 5 U.S.C. § 604

32. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403, that this *Memorandum Opinion and Order on Reconsideration* SHALL BECOME EFFECTIVE thirty days after publication of the text or a summary thereof in the Federal Register. The collection of information contained herein is contingent upon approval by the Office of Management and Budget.

33. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403 that the petition for reconsideration of the *Subscriber List Information Order* filed on November 4, 1999, by the Association of Directory Publishers IS GRANTED to the extent indicated herein and otherwise IS DENIED.

34. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403 that the petition for reconsideration and clarification of the *Subscriber List Information Order* filed on November 4, 1999, by ALLTEL Corporate Services, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

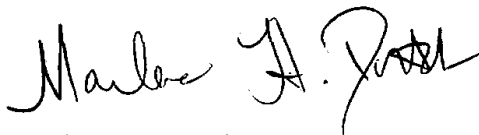
35. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403 that the petition for reconsideration of the *Subscriber List Information Order* filed on November 4, 1999, by the Bell Atlantic IS GRANTED to the extent indicated herein and otherwise IS DENIED.

36. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403 that the petition for reconsideration of the *Subscriber List Information Order* filed on November 4, 1999, by U S WEST Communications, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

37. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f), 303(r), and 403 that the petition for reconsideration of the *Subscriber List Information Order* filed on November 4, 1999, by the National Telephone Cooperative Association HAS BEEN WITHDRAWN.

38. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A – LIST OF PARTIES

Petitions for Reconsideration	Abbreviation
ALLTEL Corporate Services, Inc.	ALLTEL
Association of Directory Publishers	ADP
Bell Atlantic	
National Telephone Cooperative Association	NTCA
U S WEST Communications, Inc., now Qwest Communications International Inc.	Qwest

Comments	Abbreviation
The Association for Local Telecommunications Services and the Competitive Telecommunications Association	ALTS and CompTel
Association of Directory Publishers	ADP
Bell Atlantic	
BellSouth Corporation	BellSouth
CenturyTel, Inc. and TDS Telecommunications, Inc.	CenturyTel and TDS
GTE Service Corporation	GTE
National Telephone Cooperative Association	NTCA
Organization for the Promotion and Advancement of Small Telecommunications Companies and National Rural Telecom Association	OPASTCO and NRTA
Telecommunications Resellers Association (TRA), referred to as Association of Communications Enterprises	ASCENT
U S WEST Communications, Inc., now Qwest Communications International Inc.	Qwest
Yellow Pages Publishers Association, now Yellow Pages Integrated Media Association	YPIMA

Reply Comments	Abbreviation
Association of Directory Publishers	ADP
Bell Atlantic	
National Telephone Cooperative Association	NTCA
Telecommunications Resellers Association (TRA), referred to as Association of Communications Enterprises	ASCENT
Yellow Pages Publishers Association, now Yellow Pages Integrated Media Association	YPIMA

APPENDIX B – FINAL RULES

Part 64 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is amended to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B),(c), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254 (k) unless otherwise noted.

2. Section 64.2341 is amended by revising paragraph (c) and adding paragraphs (d) and (e) to read as follows:

§ 64.2341 Record keeping.

(c) Except to the extent specified in paragraph (d), a carrier shall make the contracts and records described in paragraphs (a) and (b) available, upon request, to the Commission and to any directory publisher that requests those contracts and records for the purpose of publishing a directory.

(d) A carrier need not disclose to a directory publisher pursuant to paragraph (c) portions of requested contracts that are wholly unrelated to the rates, terms, or conditions under which the carrier provides subscriber list information to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.

(e) A carrier may subject its disclosure of subscriber list information contracts or records to a directory publisher pursuant to paragraph (c) to a confidentiality agreement that limits access to and use of the information to the purpose of determining the rates, terms, and conditions under which the carrier provides subscriber list information to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.

APPENDIX C – SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* in CC Docket No. 96-115 (*Notice*).² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. In addition, a Final Regulatory Flexibility Analysis was incorporated in the *Third Report and Order* in CC Docket No. 96-115 (*Subscriber List Information Order*).³ This present Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) on the *Memorandum Opinion and Order on Reconsideration (Reconsideration Order)* conforms to the RFA.⁴

A. Need for, and Objectives of, Adopted Rules

2. The need for and objectives of the rules adopted in this *Reconsideration Order* are the same as those discussed in the FRFA on the *Subscriber List Information Order*. In general, these rules implement section 222(e) of the Communications Act, in order to further Congress's goal of preventing unfair local exchange carrier (LEC) practices in relation to subscriber list information and of encouraging the development of competition in directory publishing. The Commission promulgated rules pursuant to section 222(e) of the Communications Act in the *Subscriber List Information Order*. We grant in part, deny in part, or dismiss the petitions filed for reconsideration or clarification of the *Subscriber List Information Order*. In particular, we deny a request that the Commission modify the complaint procedures adopted in the *Subscriber List Information Order* by allowing a publisher to pay the presumptively reasonable rates during the pendency of a complaint and by guaranteeing that any subscriber list information rate complaint will be given accelerated docket treatment or otherwise resolved within 60 days of filing. We grant a request that the Commission eliminate a requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where customers choose to cease having their numbers listed. We confirm as a useful tool to prevent discrimination the *Subscriber List Information Order's* requirement regarding contract disclosure, but allow carriers to limit such disclosures to only those portions of contracts that are related to subscriber list information and subject such disclosures to confidentiality agreements. Finally, the Commission affirms other aspects of the *Subscriber List Information Order* that were subject to petitions

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (CWAA).

² See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12512 (1996) (*Notice*).

³ See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-98, 99-273, *Third Report and Order*, *Second Order on Reconsideration*, and *Notice of Proposed Rulemaking*, 14 FCC Rcd 15550 (1999) (*Subscriber List Information Order*).

⁴ See 5 U.S.C. § 604. We note that we also can certify this action under 5 U.S.C. § 605, because the changes in this action merely eliminate a notice requirement that is at most rarely invoked, limit the scope of our disclosure requirement for subscriber list information contracts, and allow carriers to subject disclosure of such contracts to confidentiality agreements. Therefore, there is no significant economic impact on a substantial number of small entities.

for reconsideration.

B. Summary of Significant Issues Raised by Public Comments in Response to the FRFA

3. We received no comments directly in response to the FRFA in this proceeding.

C. Description and Estimate of the Number of Small Entities to Which the Adopted Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules, if adopted.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act.⁷ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁹

5. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the rules adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission published in its *Trends in Telephone Service August 2003* report.¹⁰ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of "Wired Telecommunications Carriers,"¹¹ "Paging,"¹² and "Cellular and Other Wireless Telecommunications."¹³ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small

⁵ See 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

⁸ 15 U.S.C. § 632.

⁹ *Id.* § 601(4).

¹⁰ *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Table 5.3 (Aug. 2003) (*Telephone Trends Report*).

¹¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

¹² *Id.* § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

¹³ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

businesses that might be affected by our actions.

6. We have included small incumbent local exchange carriers (incumbent LECs) in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business, having 1,500 or fewer employees), and "is not dominant in its field of operation."¹⁴ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.¹⁵ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

7. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.¹⁶ According to Census Bureau data for 1997, there were a total of 2,225 firms in this category that operated for the entire year.¹⁷ Of this total, 2,210 firms employed 999 or fewer employees, and an additional 24 firms employed 1,000 employees or more.¹⁸ Thus, under this size standard, the great majority of firms can be considered small.

8. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a specific small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for "Wired Telecommunications Carriers." Under that standard, such a business is small if it has 1,500 or fewer employees.¹⁹ According to the FCC's *Telephone Trends Report* data, 1,337 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.²⁰ Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees.²¹ Consequently, we estimate that the majority of providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

9. *Competitive Local Exchange Carriers.* Neither the Commission nor the SBA has developed

¹⁴ 15 U.S.C. § 632.

¹⁵ Letter from Jere W. Golver, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

¹⁶ 13 C.F.R. § 121.210, NAICS code 513310 (changed to 517110 in Oct. 2002).

¹⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal form of Organization)" (1997 Economic Census, Establishment and Firm Size), Table 5, NAICS code 513310 (issued Oct. 2000).

¹⁸ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

¹⁹ 13 C.F.R. § 121.201, NAICS code 513310.

²⁰ *Telephone Trends Report*, Table 5.3, page 5-5.

²¹ *Id.*

a specific small business size standard for providers of competitive local exchange services or to competitive access providers or to "Other Local Exchange Carriers," all of which are discrete categories under which TRS data are collected. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.²² According to the FCC's *Telephone Trends Report* data, 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.²³ Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.²⁴ Consequently, the Commission estimates that the majority of providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

10. *Local Resellers.* The SBA has developed a specific size standard for small businesses within the category of "Telecommunications Resellers." Under that standard, such a business is small if it has 1,500 or fewer employees.²⁵ According to the FCC's *Telephone Trends Report* data, 133 companies reported that they were engaged in the provision of local resale services.²⁶ Of these 133 companies, an estimated 127 have 1,500 or fewer employees and 6 have more than 1,500 employees.²⁷ Consequently, the Commission estimates that the majority of local resellers may be affected by the rules.

11. *Toll Resellers.* The SBA has developed a specific size standard for small businesses within the category of "Telecommunications Resellers." Under that SBA definition, such a business is small if it has 1,500 or fewer employees.²⁸ According to the FCC's *Telephone Trends Report* data, 625 companies reported that they were engaged in the provision of toll resale services.²⁹ Of these 625 companies, an estimated 590 have 1,500 or fewer employees and 35 have more than 1,500 employees.³⁰ Consequently, the Commission estimates that a majority of toll resellers may be affected by the rules.

12. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for "Wired Telecommunications Carriers." Under that standard, such a business is small if it has 1,500 or fewer employees.³¹ According to the FCC's *Telephone Trends Report* data, 261 carriers reported that their primary telecommunications service activity was the provision of interexchange services.³² Of these 261 carriers, an estimated 223 have 1,500 or fewer

²² 13 C.F.R. § 121.201, NAICS code 513310.

²³ *Telephone Trends Report*, Table 5.3.

²⁴ *Id.*

²⁵ 13 C.F.R. § 121.201, NAICS code 513330.

²⁶ *Telephone Trends Report*, Table 5.3.

²⁷ *Id.*

²⁸ 13 C.F.R. § 121.201, NAICS code 513330.

²⁹ *Telephone Trends Report*, Table 5.3.

³⁰ *Id.*

³¹ 13 C.F.R. § 121.201, NAICS code 513310.

³² *Telephone Trends Report*, Table 5.3.

employees and 38 have more than 1,500 employees.³³ Consequently, we estimate that a majority of interexchange carriers may be affected by the rules.

13. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to operator service providers. The closest applicable size standard under the SBA rules is for "Wired Telecommunications Carriers." Under that standard, such a business is small if it has 1,500 or fewer employees.³⁴ According to the FCC's *Telephone Trends Report* data, 23 companies reported that they were engaged in the provision of operator services.³⁵ Of these 23 companies, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees.³⁶ Consequently, the Commission estimates that a majority of local resellers may be affected by the rules.

14. *Prepaid Calling Card Providers*. The SBA has developed a size standard for small businesses within the category of "Telecommunications Resellers." Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁷ According to the FCC's *Telephone Trends Report* data, 37 companies reported that they were engaged in the provision of prepaid calling cards.³⁸ Of these 37 companies, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.³⁹ Consequently, the Commission estimates that a majority of prepaid calling providers may be affected by the rules.

15. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under the SBA rules is for "Wired Telecommunications Carriers." Under that standard, such a business is small if it has 1,500 or fewer employees.⁴⁰ According to the FCC's *Telephone Trends Report* data, 92 carriers reported that they were engaged in the provision of "Other Toll Services."⁴¹ Of these 92 carriers, an estimated 82 have 1,500 or fewer employees and ten have more than 1,500 employees.⁴² Consequently, the Commission estimates that a majority of "Other Toll Carriers" may be affected by the rules.

16. *Directory Publishers*. Many directory publishers are members of either of two trade

³³ *Id.*

³⁴ 13 C.F.R. § 121.201, NAICS code 513310.

³⁵ *Telephone Trends Report*, Table 5.3.

³⁶ *Id.*

³⁷ 13 C.F.R. § 121.201, NAICS code 513330.

³⁸ *Telephone Trends Report*, Table 5.3.

³⁹ *Id.*

⁴⁰ 13 C.F.R. § 121.201, NAICS code 513310.

⁴¹ *Telephone Trends Report*, Table 5.3.

⁴² *Id.*

associations, Association of Directory Publishers (ADP) and Yellow Pages Integrated Media Association (YPIMA). ADP states that its membership includes more than 135 directory publishers. Collectively, these companies publish over 2,200 different directories annually.⁴³ While we have no current information on the number of YPIMA's members, YPIMA states that its members deliver yellow pages directories to virtually all telephone households within the United States.⁴⁴ We have also no data on how many ADP and YPIMA members have gross annual revenues of \$5 million or less. We assume, for purposes of this Supplemental FRFA, that all of these publishers are small entities that may be affected by this *Reconsideration Order*. Collectively, ADP and YPIMA members publish the vast majority of the directories published in the United States. There, however, likely are additional directory publishers that are small entities.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

17. In this section of the Supplemental FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities as a result of this *Reconsideration Order*. We also describe the steps taken to minimize the economic impact of our decisions on small entities, including the significant alternatives considered and rejected.

18. In the *Subscriber List Information Order*, the Commission adopted presumptively reasonable rates of \$0.04 per listing for base file subscriber list information and \$0.06 per listing for updates. In the *Reconsideration Order*, we deny a request that the Commission modify the complaint procedures adopted in the *Subscriber List Information Order* by allowing a publisher to pay those presumptively reasonable rates during the pendency of a complaint and by guaranteeing that any subscriber list information rate complaint will be given accelerated docket treatment or otherwise resolved within 60 days of filing. We grant a request that the Commission eliminate a requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where customers choose to cease having their numbers listed. We confirm as a useful tool to prevent discrimination the *Subscriber List Information Order*'s requirement regarding contract disclosure, but allow carriers to limit such disclosures to only those portions of contracts that are related to subscriber list information and subject such disclosures to confidentiality agreements. We decline ADP's request to change the timeframe in which carriers must inform directory publishers that they cannot comply with a request for subscriber list information to seven days. We determine that the safeguards adopted in the *Subscriber List Information Order* are sufficient and reject a request to allow a carrier to refrain from providing subscriber list information to directory publishers that the carrier believes will misuse it. We affirm that carriers may not use their publishing affiliates to avoid fulfilling their duties under section 222(e). We reject Bell Atlantic's requests that we determine that if a carrier is unable to unbundle subscriber list information in the manner that the publisher requests, the publisher must pay for all the listings received, not just the listings that the publisher uses. Finally, we reject a request that we take action under sections 201 and 202 of the Act, because such action would be beyond the scope of the original *Notice* in this docket.

⁴³ See "ADP History and Vision," available at http://www.adp.org/Default.asp?Page_ID=2, last visited Feb. 11, 2004.

⁴⁴ See "About the Yellow Pages I.M.A.," available at <http://www.yppa.org/about/index.cfm>, last visited Feb. 11, 2004.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its adopted approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁴⁵

20. In choosing among the various alternatives in the *Reconsideration Order*, we have sought to minimize the adverse economic impact on carriers and directory publishers, including those that are small entities. As was the case in the *Subscriber List Information Order*, moreover, we recognize that Congress intended section 222(e) to prevent carriers from deriving economic benefits from refusing to provide subscriber list information on a timely and unbundled basis, charging discriminatory or unreasonable rates for that information, or imposing discriminatory or unreasonable terms or conditions in connection with the provision of that information. In reconsidering our rules implementing that section, we have sought to further this congressional intent in a manner that minimizes regulatory burdens, including the burdens on small entities. The effort has resulted in our eliminating a requirement that carriers provide requesting directory publishers with notice of changes in subscriber list information in circumstances where customers choose to cease having their numbers listed. We also amend our contract disclosure rules to allow carriers to withhold from disclosure certain portions of subscriber list information contracts and to subject disclosure of such contracts to confidentiality agreements. These changes should reduce burdens on carriers, including those that are small businesses, without adversely affecting directory publishers.

21. In other instances, however, we reject as unsupported by the record proposed alternatives to the rules adopted in the *Subscriber List Information Order*. For instance, we reject as beyond the scope of this proceeding a request that we take action, pursuant to sections 201 and 202 of the Communications Act, to prohibit carriers from favoring their own directory publishing operations over their competitors' operations in connection with information regarding subscribers with unpublished or unlisted numbers. We believe that these actions properly balance the interests of carriers and directory publishers, including the members of each group that are small businesses.

F. Report to Congress

22. The Commission will send a copy of the *Reconsideration Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁶ In addition, the Commission will send a copy of the *Reconsideration Order*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Reconsideration Order* and Supplemental FRFA (or summaries thereof) also will be published in the Federal Register. See 5 U.S.C. § 604(b).

⁴⁵ See 5 U.S.C. § 603(c)(1)-(c)(4).

⁴⁶ See 5 U.S.C. § 801(a)(1)(A).